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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. -

MARION DALE FLEWALLEN,
Petitioner,
v.
GORDON FAULKNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the petitioner was denied his Sixth and Fourteenth Amendment rights to confrontation where the State made "wholesale use of prior testimony and out-of-court statements" which were not subject to the protection of oath, demeanor, and cross-examination.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional Provisions	2
Statement of the Case	3
Reasons for Granting the Writ	10
Conclusion	18
Affidavit of Service	19
Appendix:	
A. Opinion of the Seventh Circuit Court of Appeals	A-1
B. Order of May 10, 1982, of the Seventh Circuit Court of Appeals	A-8
C. Entry of July 15, 1981, the United States District Court for the Southern District of Indiana	A-9
D. Opinion of the Supreme Court of Indiana	A-13

TABLE OF AUTHORITIES

Cases: Page

California v. Green, 399 U.S. 144, 90 S.Ct. 1930 (1970) 11, 12, 13, 14, 15, 16, 17, 18

Flewallen v. Faulkner, 677 F.2d 610 (1982) 10

Flewallen v. State, 269 Ind. 70, 368 N.E.2d 239 (1977) 9, 14, 17, 18

Kirby v. United States, 147 U.S. 47, 55-56 (1899) 11

Mattox v. United States, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339 (1895) 18

Pointer v. United States, 380 U.S. 403, 85 S.Ct. 1065 (1968) 11

State v. Saporen, 205 Minn. 358, 362 285 N.W. 898, 901 (1939) 16, 17

AMENDMENTS TO UNITED STATES CONSTITUTION

Sixth Amendment 2, 10, 11

Fourteenth Amendment 2, 10

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 677 F.2d 610. It is reprinted in the Appendix, *infra*, App. A.

The opinion of the United States District Court for the Southern District of Indiana is unreported but is reprinted in the Appendix, *infra*, App. C.

The opinion of the Indiana Supreme Court is reported at 289 Ind. 70, 338 N.E.2d 239. It is reprinted in the Appendix, *infra*, App. D.

JURISDICTION

This Habeas Corpus action, brought pursuant to 28 U.S.C. §2254, commenced in the United States District Court for the Southern District of Indiana. Habeas corpus relief was denied on July 15, 1981. *See*, Order of July 15, 1981; App. C, *infra*. Furthermore, all State remedies had previously been exhausted. *See*, 368 N.E.2d 239 (Ind. 1977); App. B, *infra*.

On May 10, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. *See*, Order of May 10, 1982; App. B, *infra*. This Resultant petition for writ of certiorari is filed within the ninety (90) day time limit imposed by law. *See*, *Riddle v. Dyche*, 262 U.S. 333, 335-6 (1923). The jurisdiction of this Court is therefore invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the United States Constitution are as follows:

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.

Amendment XIV:...nor shall any state deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

On September 10, 1974, the Vanderburgh County, Indiana, Grand Jury indicted petitioner Marion Dale Flewallen for the crime of Second Degree murder in connection with the death of Erica R. Gribsby, the four-year old daughter of Flewallen's wife, Virginia Winona Flewallen. *[R. at 12]. Flewallen entered a special plea of "temporary insanity" on December 5, 1975. [R. at 60]. Flewallen's trial lasted from March 16, 1976, until March 25, 1976, at which time the jury returned a verdict of guilty of Second Degree Murder, and sentenced him to life imprisonment. [R at 136].

The following relevant facts were adduced by the evidence presented by the State of Indiana at petitioner's trial:

Dr. Albert Venables, the pathologist who performed the autopsy on the dead child, testified that the cause of death was "bleeding from a puncture wound of the heart produced by a broken rib." [R. at 191]. The time of death was stipulated to be 5:59 P.M. on August 30, 1974. [R. at 193]. Dr. Venables further testified that there were indications of other "traumas" on the body of the victim which, in his opinion, occurred approximately two days prior to the child's death. These traumas were described as bruises on the chest and buttocks and a cut on the inside of the lip. [R. at 192-199]. Dr. Venables testified that in his opinion, the injury which brought about the child's death was delivered by a forcible blow with a soft object, possibly a hand, and that the injury could not, in his opinion, have been the result of an accidental fall. [R. at 200.]

Commencing with the testimony of state's witness Bonnie Barnett, the State of Indiana was allowed to

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*[R. at ___] refers to page citations in the duly certified and transcribed "Record of Proceedings" of petitioner's trial filed with the Indiana Supreme Court, Cause No. 976 S 304.

introduce over defense objection, various extrajudicial prior statements made by six different state's witnesses. *All of these statements were admitted as substantive evidence.* The following objection was made by defense counsel to the introduction of Barnett's entire Grand Jury testimony. (State's Exhibit #11) and "voluntary" police statement (State's Exhibit #12):

> Mr. Rice: Yes, and I would object to both of them and include in my objection the same one that I made on a prior occasion, and supplement the objection by stating that it violates the defendant's Constitutional rights as enunciated by the Sixth Amendment to the United States Constitution. And also, for the reason that at least the Grand Jury minutes contain inadmissible statements, statements that would be inadmissible in Court...
>
> * * * * *
>
> By Court: I've noted that objection, Mr. Rice. And let the record reflect that the objection is overruled.

[R. at 395-6]. Defense counsel did admit that State's Exhibit #12, the police statement, seemed not to contain any inadmissible evidence, but renewed his objection on constitutional grounds. [R. at 396].

The substance of Barnett's police statement was that on the day of the child's death she observed Virginia Winona Flewallen, outside of her apartment building, holding a "limp baby", and saying, "Oh my God, help me. Oh my God, help me," and that she then saw a neighbor take Mrs. Flewallen to the hospital. Barnett also indicated in her statement that she saw a neighbor take Mrs. Flewallen to the hospital. Barnett also indicated in her statement that she saw a man, identified as Flewallen, run down the sidewalk "real fast" at the same time that the mother was getting in the car with the child. [R. at 397]. In addition, she

told the police that two days prior to the little girl's death, she had looked from apartment across to the Flewallen's apartment and had seen the Flewallens fighting and heard the mother scream, "Don't hurt my baby, don't kill it." [R. at 397].

During the reading of Barnett's Grand Jury testimony, defense counsel was forced to object to various questions and answers by interupting the prosecutor as he read the transcript to the jury. On re-direct examination, over defense objection, the State was permitted to introduce into evidence Bonnie Barnett's prior extrajudicial statement to the coroner. [R. at 439].

State's witness Golda Willis was merely asked to identify herself before being asked to authenticate her written statement given previously to the Evansville Police (State's Exhibit #15). Over timely defense objection on Sixth Amendment grounds, Willis' statement was admitted into evidence. [R. at 441]. The statement was read to the jury by the prosecutor. Willis' testimony before the Vanderburgh County Grand Jury (State's Exhibit #15) was read to the jury in like manner immediately following the reading of the police statement. [R. at 448]. Once again, defense counsel was permitted to object to some of the questions and answers contained in both documents during the course of the prosecution's recitation. The substance of Golda Willis' statements was that on the day of the child's death, she saw Virginia Winona Flewallen running out of her apartment with a limp child in her arms, crying "Oh my God, help me. God, help me." Mrs. Flewallen and the child then got into a car with a Mr. and Mrs. Harris and drove away. [R. at 451-53].

Shortly thereafter, Ms. Willis saw Marion Flewallen exit has apartment and walk off in the opposite direction. [R. at 453]. Ms. Willis also stated that she had previously seen the defendant strike the child. [R. at 455]. It is noteworthy that even questions asked the witness by various grand jurors

were read to the jury by the prosecutor. [R. at 457]. The only questions which the prosecutor asked Ms. Willis directly were merely repetitions of questions contained in the extrajudicial statements.

Promptly upon assuming the witness stand, state's witness Virginia Winona Flewallen, the mother of the dead child, was asked to authenticate her prior statement to the Evansville police (State's Exhibit #16), and testimony before the Vanderburgh County Grand Jury (State's Exhibit #17). Both exhibits were admitted over defense objection. [R. at 473-4]. The substance of Mrs. Flewallen's lengthy statements were that soon after she married the defendant, he began to abuse and beat the child frequently. Her statements indicated that on the day of the child's death she was upstairs in the family's apartment. At the time, it was her belief that Flewallen had just left the apartment, and that the child was downstairs alone. Presently she heard a noise. She ran downstairs and found the child lying at the bottom of the stairs [R. at 516]. She then picked the child up, ran out the door carrying it in her arms, and found a couple named Harris to take her and the child to the hospital. [R. at 516-19]. The defendant arrived at the hospital shortly thereafter. She stated that she told him the child was dead, and that after she told him, "Sweat started pouring off him and he kept saying 'No, no, no.'" [R. at 521]. During her appearance before the Grand Jury, the following exchange occurred between one of the grand jurors and Mrs. Flewallen:

Q Do you still think she fell down the steps?

A No.

Q What do you think now?

A I think he might have done it.

Q He might have done it?

A And, he did, because I know I didn't.

[R. at 531].

The prosecutor, on direct examination and over defense objection, used her answers to the above questions to impeach Mrs. Flewallen after she testified in open court that she believed that the child died by accidentally falling down the steps. [R. at 584]. She explained this inconsistency by stating that she had made the previous statements implicating her husband because she was afraid that she would be blamed for the death, put in prison, and have her unborn child eventually taken away from her. [R. at 583]. The prosecution later brought out during the direct examination that she had in fact plead guilty to the crime of Cruelty to a child in connection with her daughter's death. [R. at 666].

State's witness Sally Quackenbush was merely asked by the prosecutor to authenticate her prior statement to the Evansville Police (State's Exhibit #27), and her previous testimony to the Vanderburgh County Grand Jury (State's Exhibit #28). [R. at 755]. Both documents were admitted as substantive evidence over defense objection. [R. at 755-6], and the prosecutor was permitted to read the transcripts of both exhibits to the jury. The relevant portions of Ms. Quackenbush's statements described her view of the defendant leaving his home and walking down the state on the afternoon of the child's death. [R. at 764]. Defense counsel was allowed to object to particular questions as the prosecutor was reading the transcripts, and some objections were in fact sustained.

State's witness Linda Reed testified that two days prior to the child's death, Virginia Winona Flewallen had brought the child over to her apartment, stated that the defendant had beaten the child and herself, and asked if they could spend the night. [R. at 772-3]. Mrs. Reed related that she observed bruises on the child's bottom, and that Mrs. Flewallen had a "big knot". Both mother and daughter spent the night with Mrs. Reed. [R. at 773].

The Grand Jury testimony of Tina Shelton, (State's Exhibit #29), was admitted as substantive evidence, over defense objection. [R. at 787]. The prosecutor was then allowed to read the entire transcript of her testimony to the jury. Defense counsel was permitted to interrupt the prosecutor's recitation for the purpose of making objections to certain questions, and some of his objections were sustained by the Court. Ms. Shelton related to the Grand Jury an instance prior to the child's death where the defendant had abused the child [R. at 803], and that she had noticed bruises on the child on one occasion. [R. at 807].

State's witness Carolyn Phillips testified that she had once kept the child, Erica, for a two-day period, and that she had seen bruises on the child's head. [R. at 824]. She also testified that she had seen writing on the child's crib which read "Erica is a monster." [R. at 834]. Upon refreshing her memory by reviewing her Grand Jury testimony, Ms. Phillips testified that during the period when Erica was staying with her, she also observed "cuts on her bottom caused by a ring." [R. at 835]. The transcript of Ms. Phillips' Grand Jury testimony was never actually admitted into evidence.

State's witness Paul Boner testified that he had once observed the child's bed with the words "Erica is a monster" inscribed on the headboard. [R. at 842].

Debra Grigsby, a witness called by the State, testified that she had once seen the child with blackened eyes and infected and apparent burns on her back. [R. at 852].

State's witness Virginia Gallion, Virginia Flewallen's mother, was asked by the prosecutor, shortly after taking the witness stand, to authenticate her prior statement to the Evansville Police (State's Exhibit #31), and a transcript of her previous testimony before the Vanderburgh County Grand Jury. [R. at 862-3]. Both documents were admitted as substantive evidence over the defendant's objection, and the prosecutor was allowed to read the documents to the

jury. [R. at 863]. Defense counsel was required to object to particular questions by interrupting the prosecutor during the course of the prosecutor's recitation of the witness' prior statements. Some of his objections were sustained. In the transcripts, Ms. Gallion outlined her daughter's general background, revealing that the deceased child had once been taken that two days prior to the child's death she had observed no marks or bruises on the child's body, although she had seen the child with bruises on prior occasions. [R. at 886-7].

The rest of the evidence presented by the state was mostly corroborative and not relevant to the issue present to this Court.

The case for the defense consisted of testimony by a psychiatrist and psychologist relating to the defendant's sanity at the time of the alleged offense. In addition, two court-appointed psychiatrists testified concerning the defendant's mental state at the time of the alleged offense, pursuant to a requirement under Indiana statute in cases where the defense of insanity is interposed. It is sufficient to say that much of the medical evidence was conflicting. None of the medical evidence is relevant to the issue presently before this Court.

On June 11, 1976, the petitioner filed a "Motion to Correct Errors" alleging the violation of his right to confrontation. Said motion to correct errors was promptly overruled by the trial court. [R. at 192]. The aforementioned overruling of petitioner's "Motion to Correct Errors" was duly appealed to the Supreme Court of Indiana. The Indiana Supreme Court held that the petitioner was not denied his constitutional right to confrontation and therefore his conviction was affirmed. *See*, Appendix, *Flewallen v. State*, (1977) 267 Ind. 90, 368 N.E.2d 239.

The petitioner's state remedies having been exhausted, petitioner filed for a Writ of Habeas Corpus in the United States District Court for the Southern District of Indiana

pursuant to 28 U.S.C. §2254(c). The sole issue before the District Court was whether or not the petitioner had been afforded his right to confrontation. On July 15, 1981, the District court denied the petition for Writ of Habeas Corpus after considering it upon the merits. (*See*, Entry of July 15, 1981, *See* Appendix).

Petitioner continued his quest for justice by appealing the District Court's Order to the United States Court of Appeals for the Seventh Circuit. Jurisdiction was vested in the court pursuant to 28 U.S.C. §2253 and 28 U.S.C. §2254. Once again, confrontation was the sole issue presented for review.

On May 10, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court using the following language:

> In conclusion, although we do not condone or encourage use of the procedure challenged here, in the absence of any demonstrated or apparent prejudice to Flewallen occasioned by its use, we conclude that Flewallen's Sixth Amendment rights were not abridged. Thus, the judgment of the district court is AFFIRMED.

Flewallen v. Faulkner, 667 F.2d 610 (1982), *See*, Appendix.

The instant petition for Writ of Certiorari seeks review of the aforementioned decision of the United State's Court of Appeals.

REASONS FOR GRANTING THE WRIT

This petition provides the Court with the opportunity to clarify the parameters of an accused's right to confrontation. If a writ of certiorari is granted in this cause, the sole substantive issue presented for review will be whether or not the petitioner was afforded his Sixth and Fourteenth Amendment rights to confront his accusers. The petitioner contends that the Indiana Supreme Court,

the United States District Court, and the United States Court of Appeals for the Seventh Circuit misconstrued the concept of confrontation and thus erred in holding that the petitioner was afforded an adequate opportunity to confront his accusers at trial.

In determining the propriety of the procedures used at petitioner's trial, one must first look to the language of the Sixth Amendment. The Sixth Amendment, in pertinent part, reads as follows: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This right to confrontation has been aptly described by this Court as "[o]ne of the fundamental guarantees of life and liberty." *Kirby v. United States*, 174 U.S. 47, 55-56, (1899). Furthermore, after much consideration was given to the fundamental nature of the confrontation clause, this Court held that the right to confrontation is essential to preserving due process of law and must therefore be protected throughout the states via the Fourteenth Amendment. *Pointer v. United States*, 380 U.S. 403, 85 S.Ct. 1065 (1968).

Although many cases have interpreted the confrontation clause, *California v. Green* is the Court's leading case on the right to confrontation. *California v. Green*, 399 U.S. 144, 90 S.Ct. 1930 (1970). In *Green*, a sixteen-year-old boy was arrested for selling marijuana to an undercover police officer. The boy named Green as his supplier and so testified at Green's preliminary hearing. At said preliminary hearing, the youth was extensively cross-examined by Green's trial attorney. At trial, however, the youth claimed that he could not remember whether or not Green was his supplier. This uncertainty was ostensibly due to the youth's ingestion of a quantity of LSD. Upon motion by the State, the trial court admitted the youth's preliminary-hearing testimony into evidence. The preliminary-hearing testimony was admitted as substantive evidence of Green's guilt and not merely for impeachment purposes.

Green was ultimately convicted and he subsequently appealed claiming that the introduction of the preliminary-hearing testimony violated his right to confrontation. In reviewing the propriety of the complained of procedure, this Court held that an accused's right to confrontation:

> 1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
>
> 2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth";
>
> 3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. at 158, 90 S.Ct. at 1935 (1970).

This Court determined that the above-enumerated requirements for adequate confrontation were satisfied by the procedures used at Green's trial. *California v. Green*, 399 U.S. at 164, 90 S.Ct. at 1938. The Court noted that since the State's witness told one version of the critical events at the preliminary hearing and a conflicting version at trial, the oath and demeanor requirements of confrontation were satisfied. *California v. Green*, 399 U.S. at 159, 90 S.Ct. at 1935. The Court reasoned that since the trier of fact was made aware of the conflicting sets of testimony, the observance of the witness's demeanor under oath as he gave his in-court testimony had allowed the trier of fact to adequately assess the veracity of his preliminary-hearing testimony. *California v. Green*, 399 U.S. at 159-60, 90 S.Ct. at 1935.

In examining the adequacy of the cross-examination of the State's witness, the Court decided that the cross-examination in question passed muster for two reasons. First, the Court noted that the purpose of cross-

examination is to shake the reliability of the witnesses' story and to demonstrate that another interpretation of the facts is possible. This Court determined that since the youth's two sets of testimony were in sharp conflict and since his testimony at trial was favorable to the defendant, the witness himself had accomplished more than can be hoped for during normal contemporaneous cross-examination. *California v. Green*, 399 U.S. at 159, 90 S.Ct. at 1935. The Court then held that irrespective of the youth's testimony at trial, the admission of the preliminary-hearing testimony was proper in that Green's trial attorney was able to secure full and effective contemporaneous cross-examination of the youth's testimony during the preliminary hearing. *California v. Green*, 399 U.S. at 165 90 S.Ct. at 1938. The Court decided that the cross-examination at the preliminary hearing produced circumstances which closely approximated those of the typical trial. *Id.* Therefore, the lack of effective cross-examination at trial was remedied by the petitioner's ability to have the full-blown cross-examination from the preliminary hearing introduced at trial. *Id.*

In the instant case, however, the petitioner was not afforded adequate confrontation. Although the facts of the instant case are superficially similar to those of *Green*, a close inspection reveals that none of the three aforementioned requirements of confrontation, i.e., oath, demeanor, and cross-examination, were satisfied by the procedures used at petitioner's trial.

The challenged procedure, used over petitioner's strenuous objections, is best summarized in the dissenting opinion of Justice DeBruler of the Indiana Supreme Court. Justice DeBruler described the petitioner's trial as follows:

> This case involves the wholesale use of prior testimony and out-of-court statements of less than enthusiastic prosecution witnesses during their direct examination. Five statements given by witnesses to

> the police, one statement to the coroner, and six sets of grand jury testimony were read, virtually in their entirety, to the jury during the examination of six witnesses. The extrajudicial statements of two of the witnesses were introduced and read only after those witnesses had been questioned as to the events involved and had professed difficulty in remembering those events. *The remaining four witnesses were simply called to the stand for the purpose of authenticating their respective statements and testimony, which were read to the jury before these witnesses were asked any questions about the events surrounding the death of Erica Grigsby.*

Flewallen v. State, 368 N.E.2d 239, 243 (1977, DeBruler J. dissenting, original emphasis).

When one applies the analysis used in *Green* to the facts of the petitioner's case, it is apparent that an egregious violation of petitioner's constitutional rights occurred. In *Green*, the confrontation requirements of oath and demeanor were satisfied by the State's witness' subjection to a formal oath at the time that he made his challenged statements and by the fact that the witness completely contradicted his pretrial statements with his at-trial testimony. *California v. Green, supra.* In the case at bar, however, there was no dramatic and inexplicable pro-defense shift in the witnesses' testimony. *Flewallen v. State*, 368 N.E.2d at 241. The erroneously admitted pre-trial declarations "were consistent with the statements given by the witnesses on the stand, though the previous statements were more detailed in each case." *Id.* Therefore, instead of the trier of fact being able to observe the demeanor of a witness who has substantially changed his story, the jury in the petitioner's case merely observed witnesses who claimed to have forgotten most of the details of their previous statements. The jury had no way in which to evaluate the veracity of the out-of-court statements. The jury's only natural conclusion would be to assume that the

prior statements were true and that the passage of time had merely blurred otherwise accurate memories. Unfortunately, this natural conclusion destroys the very essence of confrontation.

Furthermore, six of the challenged statements in the instant case were never made pursuant to an oath and thus the declarants were never impressed "with the seriousness of the matter" and the "possibility of a penalty for perjury." *California v. Green*, 399 U.S. at 158, 90 S.Ct. at 1935. This total absence of the safeguard of an oath on six of the detailed statements which were read at trial is in marked contrast to the statements which were admitted in *Green*. In *Green*, each of the statements which this Court ruled the admission of which did not violate Green's right to confrontation were sworn statements given during a formal preliminary hearing made under oath in "circumstances which closely approximated those of the typical trial." *California v. Green*, 399 U.S. at 165, 90 S.Ct. at 1938. The State cannot seriously contend that informal statements given to police officers or the coroner were given under circumstances which closely resembled a full blown adversarial proceeding. Therefore, since the witnesses against the petitioner did not dramatically shift their testimony to favor the petitioner and since many of their pre-trial statements, which were admitted without in-court substantiation, were never made pursuant to an oath, the confrontation clause components of oath and demeanor cannot be said to have been satisfied.

The final component of confrontation is cross-examination. Absent "full and effective" cross-examination, the proceedings at trial cannot pass muster under the Constitution. *California v. Green*, 399 U.S. at 158, 90 S.Ct. at 1935.

In the petitioner's case as well as in *Green*, the jury was not afforded the opportunity to observe the State's witnesses being cross-examined as they made their pre-

trial declarations. Instead, the respective trial courts allowed the State to substitute subsequent cross-examination for contemporaneous cross-examination. In *Green*, this Court determined that "[t]he main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witnesses' '[f]alse testimony is apt to harden and become unyielding to the blows of truth as the witness has the opportunity for reconsideration and influence by the suggestion of others, who's interest may be, and often is, to maintain falsehood rather than truth.'" *California v. Green*, 399 U.S. at 160, 90 S.Ct. at 1936 (*quoting, State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939)).

This Court concluded that the trial Court in *Green* averted the above-described danger for two reasons. First, this Court noted that "[t]he most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant." *California v. Green*, 399 U.S. at 159, 90 S.Ct. at 1935. Second, and most importantly, this Court held that since the challenged declarations in *Green* were made at a formal, adversarial preliminary hearing which closely approximated the circumstances of a "typical trial", the perils of the absence of contemporaneous, at-trial cross-examination of the declarations were negated. *California v. Green*, 399 U.S. at 185 S.Ct. at 1938.

The facts of the instant case do not support such a holding. As previously discussed, there was no pro-defense shift in testimony. It cannot seriously be contended that the fact that the witnesses forgot some of the incriminating details of their prior statements accomplished more in the presence of the jury than "[t]he most successful cross-examination at the time the statement[s][were] was made."

California v. Green, 399 U.S. at 159, 905 S.Ct. at 1935. Instead, it is much more likely that the trier of fact would merely assume the veracity of the out-of-court declarations and would attribute the defects in memory to the ravages of time. Therefore, adequate confrontation was not salvaged by the content of the witnesses' testimony at trial.

Finally and most strikingly, the challenged declarations introduced against the petitioner were definitely not given under circumstances closely approximating those of a trial. Moreover, the petitioner did not have an opportunity to cross-examine the declarants as they made their out-of-court statements. This is not a case of the admission of testimony given under the penumbra of a formal preliminary hearing where competent counsel represent all parties. This is, instead, a case of the admission of "[f]ive statements given by witnesses to the police, one statement to the coroner, and six sets of Grand Jury testimony." *Flewallen v. State*, 368 N.E.2d 239, 243. In not one instance were the declarants subjected to any cross-examination as they made their pre-trial statements nor was the petitioner afforded the right to such cross-examination. Furthermore, the petitioner was not even allowed to be present during the questioned declarations.

This is definitely a case where "[f]alse testimony is apt to harden and become unyielding to the blows of truth." *California v. Green*, 399 U.S. at 159, 90 S.Ct. 1935 (*quoting, State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 398, 901 (1939)). There was no changing testimony or functional equivalent of contemporaneous cross-examination to insure against the dangers of "substituting subsequent for timely cross-examination". In short, there was no "full and effective" cross-examination of the out-of-court declarations which were admitted as substantive evidence against the petitioner. If a witness cannot remember the factual basis for his statements, how can petitioner be said to have had the requisite opportunity "not only of testing the

recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief". *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339 (1895).

In conclusion, the petitioner contends that *California v. Green* was never intended to emasculate one's constitutional right to confrontation to the point of "reliev[ing] the State of the obligation to make any attempt to prove its case through the testimony of sworn witnesses given in open court where the trier of fact can observe their demeanor and where cross-examination takes place more or less contemporaneously with the testimony's recreation." *Flewallen v. State*, 368 N.E.2d at 243. (DeBruler J. dissenting). The State's tactics guaranteed that none of the key witnesses against the petitioner were subjected to the three requisite confrontation components of oath, demeanor, and cross-examination. The trial court's failure to insure the petitioner's right to confrontation is an error of such magnitude that justice demands the reversal of petitioner's conviction and a clarification of the parameters of the confrontation clause.

CONCLUSION

For all of the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Nile Stanton, first being duly sworn upon my oath, do depose and that 40 copies of the foregoing petition have been served upon the Clerk of the Supreme Court of the United States Supreme Court, and 3 copies have been sent to Mr. Linley E. Pearson, Indiana Attorney General, 219 State House, Indianapolis, Indiana 46204, all by United States certified mail this ____ day of August, 1982.

NILE STANTON